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SEPARATION OF CHURCH AND STATE IN JAPAN: WHAT HAPPENED TO THE CONSERVATIVE SUPREME COURT?

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INTRODUCTION

Since around the turn of the millennium, observers of Japanese law and politics have been concerned about the disconcerting signs that Japanese politicians are increasingly nationalistic: Ex-Prime Minister Yoshiro Mori described Japan as a “divine nation centering on the Emperor”¹ in his speech at a gathering of pro-Shinto lawmakers in 2000; his successor, Junichiro Koizumi, repeatedly visited the controversial Yasukuni Shrine throughout his term in office,² triggering an outcry from Asian neighbors.

The political climate in Japan has changed considerably over the past several years. Gone are the ultraconservatives’ proposals for constitutional revision to strengthen the power of

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¹ *Mori’s ‘Divine Nation’ Remark Spurs Outrage*, JAPAN TIMES, May 17, 2000, available at <http://search.japantimes.co.jp/print/nn20000517a1.html>.

² Koizumi served as Prime Minister of Japan from April 2001 to September 2006. Reiji Yoshida & Kazuaki Nagata, *Koizumi To Exit Political Stage*, JAPAN TIMES, Sept. 26, 2008, available at <http://www.japantimes.co.jp/text/nn20080926a1.html>.

the Emperor, and arrived are an unprecedented number of tourists from around the world.³ Economic partnership agreements with Indonesia and the Philippines took effect in 2008, creating a flow of candidates for nurses and care workers moving into Japan.⁴ Not a single day passes by without news or comments on Asia-Pacific integration. Japan finally seems to be opening its doors and minds to its surrounding nations.

In *Kikuya v. Taniuchi*,⁵ the Supreme Court of Japan, which appeared so reluctant to exercise its power of judicial review in the past, joined this tide and ruled that a Shinto shrine's use of city-owned-land free of charge was impermissible under Article 89 of the Japanese Constitution, a provision which prohibits the use of public resources for religious purposes. Until this decision was made, the purpose and effect test modeled after *Lemon v. Kurtzman*⁶ had been in place in case law, but the Court's own narrow formulation of the doctrine had essentially prevented Japanese taxpayers from successfully litigating separation of church and state cases. Since the adoption of the test in 1977, there was only one judgment invalidating governmental action in this field.

In applying the much more flexible "totality of the circumstances" analysis, the majority in *Kikuya* demonstrated its awareness of the highly political context of the case and of its possible international implications. The motivation for judicial activism seems clear: the perception of the need for increased protection of fundamental constitutional values and for eradication of pre-modern customs in order to "occupy an honored

³ According to the data compiled by the Ministry of Land, Infrastructure, Transport, and Tourism, based on the Ministry of Justice's documents, the number of international visitors to Japan was 8.35 million in 2008, hitting a record high. See *Number of Inbound and Outbound Travelers*, JAPAN TOURISM AGENCY, http://www.mlit.go.jp/kankocho/en/siryou/toukei/in_out.html (last updated Apr. 12, 2010).

⁴ See *More Nurses, Caregivers Arrive from Indonesia Under Agreement*, JAPAN TIMES, Aug. 8, 2010, available at <http://search.japantimes.co.jp/cgi-bin/nn20100808a5.html>.

⁵ Saikō Saibansho [Sup. Ct.] Jan. 20, 2010, 64 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1 (Japan).

⁶ 403 U.S. 602, 612 (1971).

place in an international society striving for . . . the banishment of . . . oppression and intolerance”⁷ as outlined in the Preamble to the Constitution of Japan.

This Article first introduces the Japanese constitutional scheme as it relates to separation of church and state and explains the case law governing this area. It then compares this constitutional scheme with the new approach taken in *Kikuya*. Following the discussion about the Japanese Supreme Court’s recent willingness to break with precedent in high-profile cases involving constitutional issues, it concludes with a suggestion that the development is best understood as an example of the judiciary’s self-conscious efforts to rectify unconstitutional governmental practice in light of the progress of globalization. Indicating that the Japanese Supreme Court is prepared to fulfill its mandate to the fullest extent, *Kikuya* has signaled a new era for law and religion in Japan, whose constitution is a sister to the United States Constitution but whose people’s religious consciousness stands in sharp contrast with that in the United States.⁸

I. THE JAPANESE CONSTITUTION AND THE SEPARATION OF CHURCH AND STATE

From a perspective of comparative law, Japan is a “mixed jurisdiction” in the sense that its legal system is built upon dual foundations of common-law and civil-law materials.⁹ While many of the other so-called mixed jurisdictions are typically former French or Dutch colonies that were later occupied or acquired by Britain or the United States—which is the case in places like Louisiana, Quebec, South Africa, and Sri Lanka—Japan does not share such history. It follows the general pattern usually found

⁷ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], pmbl. (Japan) (GOV’T PRINTING BUREAU trans.), available at <http://www.ndl.go.jp/constitution/e/etc/c01.html>.

⁸ Of the 30% of Japanese adults who claimed to have a religion, 75% considered themselves Buddhists, 19% Shintoists, and 12% Christians, according to a recent survey. See Audrey Barrick, *More People Claim Christian Faith in Japan*, CHRISTIAN POST (Mar. 19, 2006, 10:24 AM), <http://www.christianpost.com/news/more-people-claim-christian-faith-in-japan-1549/>. The teenage population revealed somewhat different statistics; “[o]f the 20 percent who professed to have a religion, 60 percent called themselves Buddhists, 36 percent Christians and Shintoists.” *Id.*

⁹ Vernon Valentine Palmer, *Introduction to the Mixed Jurisdictions*, in MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 3, 7–8 (Vernon Valentine Palmer ed., 2001).

in mixed legal systems, however, in that its private law has been principally rooted in the civil law tradition, whereas its public law is primarily Anglo-American.¹⁰ This is because Japan created its modern legal system following the continental European model in the nineteenth century, but its constitution was completely revised under the American influence in 1946.

This means that the system of judicial review was introduced to Japan after the Second World War. It also means that, realistically, the protection of individual rights and liberties started in the latter half of the 1940s, because the previous Japanese constitution was modeled after the Constitution of the Kingdom of Prussia of 1850, which was highly autocratic in nature. Under the Constitution of the Empire of Japan, adopted in 1889 and often referred to as the Meiji Constitution,¹¹ all the powers were in the hands of the Emperor,¹² checks and balances among governmental branches were virtually nonexistent, and reservations were attached to the guarantee of rights and liberties.¹³ According to its text, Japanese "subjects" enjoyed the freedom of religion, but only "within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects."¹⁴

¹⁰ See *id.* at 8–10.

¹¹ The Meiji Constitution was promulgated by the Emperor Meiji on February 11, 1889. It took effect on November 29, 1890, and continued to be in force until it was superseded by the Constitution of Japan on May 3, 1947. See *infra* note 12.

¹² See NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], ch. 1 (Japan) (GOV'T PRINTING BUREAU trans.), available at <http://www.ndl.go.jp/constitution/e/etc/c01.html>; DAI NIHON TEIKOKU KENPŌ [MEIJI KENPŌ] [CONSTITUTION], art. 4 (Japan) (Ito Miyoji trans.), available at <http://www.ndl.go.jp/constitution/e/etc/c02.html> ("The Emperor is the head of the Empire . . ."); *id.* art. 5 ("The Emperor exercises the legislative power with the consent of the Imperial Diet."); *id.* art. 6 ("The Emperor gives sanction to laws, and orders them to be promulgated and executed."); *id.* art. 57, para. 1 ("The Judicature shall be exercised by the Courts of Law according to law, in the name of the Emperor.").

¹³ See, e.g., DAI NIHON TEIKOKU KENPŌ [MEIJI KENPŌ] [CONSTITUTION], art. 22 (Japan) (Ito Miyoji trans.), available at <http://www.ndl.go.jp/constitution/e/etc/c02.html> ("Japanese subjects shall have the liberty of abode and of changing the same within the limits of the law."); *id.* art. 29 ("Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meetings and associations.").

¹⁴ *Id.* art. 28.

Their duties as subjects turned out to be quite onerous: Shintoism, whose highest authority is the Emperor,¹⁵ was made a de facto national religion,¹⁶ Shinto shrines all over the country were granted a privileged status, and they became a mechanism of conveying the will of the Emperor to his subjects. Selfless devotion to the sun goddess Amaterasu Omikami, the mythical ancestor of the Imperial family, was demanded. A special statute was passed in the Imperial Diet in 1906 to let the national treasury fund the operating expenses of more than two hundred Shinto shrines of major importance,¹⁷ and an Imperial edict issued that same year directed all the prefectures, cities, towns, and villages in Japan to make seasonal offerings to Shinto shrines in their domain.¹⁸ The government did this by explaining that Shintoism was not a religion,¹⁹ but a Japanese tradition or convention that every person should abide by.

All this changed when the German-style Meiji Constitution was replaced by the present constitution, pursuant to the Potsdam Declaration and subsequent suggestions made by General Douglas MacArthur, the Supreme Commander for the Allied Powers (the "SCAP"). The Constitution of Japan, which was proclaimed in 1946 and came into effect in 1947, provides that the Supreme Court has the power to determine the constitutionality of any statute or governmental action²⁰ and that law or governmental action that is contrary to the Constitution shall have no legal force or validity.²¹ It has an extensive list of individual rights and liberties as well,²² thanks to the meticulous

¹⁵ Shintoism is the traditional Japanese religion. MARILYN REID, MYTHICAL STAR SIGNS 25 (2005). Worshipping the Emperor as a descendant of the sun goddess is still an important part of its practice today. *Id.*

¹⁶ See Eiichiro Takahata, *Religious Accommodation in Japan*, 2007 BYU L. REV. 729, 736.

¹⁷ Law No. 24 of 1906 (Japan).

¹⁸ Imperial Edict No. 96 of 1906 (Japan).

¹⁹ See Takahata, *supra* note 16, at 736 n.64. ("Shinto priests were treated as state officials and shrines as public institutions. In schools, students were strongly encouraged to visit a shrine, even if it was against the students' beliefs. The government asserted that since Shinto was not a religion, these actions did not contradict the Constitution.").

²⁰ See NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 81 (Japan) (GOV'T PRINTING BUREAU trans.), available at <http://www.ndl.go.jp/constitution/e/etc/c01.html>.

²¹ See *id.* art. 98.

²² See *id.* art. 10–40 (Chapter III of the Constitution of Japan, entitled "Rights and Duties of the People," is the Japanese Bill of Rights). There are very few

and passionate efforts of U.S. legal advisors working under the SCAP, including Courtney Whitney and Milo E. Rowell. The spirit of the rule of law and the essence of *Marbury v. Madison*²³ are explicitly embodied into the text of the Constitution, as well as other related political ideals such as representative democracy²⁴ and separation of powers.²⁵

Mindful of the disastrous consequences of commingling politics with religion before and during the war, the present Constitution pays special attention to the issue of separation of church and state.²⁶ Paragraph 1 of Article 20 states the basic principle that no religious organization shall receive any privileges from the State nor exercise any political authority, while the following paragraph specifies that no person shall be compelled to take part in any "religious act, celebration, rite or practice."²⁷ Paragraph 3 of Article 20 draws a corollary therefrom and sets a limit on governmental conduct: "The State and its organs shall refrain from religious education or any other religious activity."²⁸ Finally, Article 89 elaborates the point as it relates to finance by providing that "[n]o public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority."²⁹

provisions concerning duties. *But see id.* art. 26, para. 2 ("All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law."); *id.* art. 30 ("The people shall be liable to taxation as provided by law.").

²³ 5 U.S. 137 (1803).

²⁴ See NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 43, para. 1 (Japan) (GOV'T PRINTING BUREAU trans.), available at <http://www.ndl.go.jp/constitution/e/etc/c01.html> ("Both Houses shall consist of elected members, representative of all the people.").

²⁵ See *id.* art. 41 ("The Diet shall be the . . . sole law-making organ of the State."); *id.* art. 65 ("Executive power shall be vested in the Cabinet."); *id.* art. 76 para. 1 ("The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.").

²⁶ The General Headquarters of the Allied Powers had issued a directive instructing the Japanese government to stop providing special support and supervision to Shintoism in 1945. See GHQ Directive of December 15, 1945 (Japan).

²⁷ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 20, para. 1 (Japan) (GOV'T PRINTING BUREAU trans.), available at <http://www.ndl.go.jp/constitution/e/etc/c01.html>.

²⁸ *Id.* art. 20, para. 3.

²⁹ *Id.* art. 89.

The leading case in this area is *Kakunaga v. Sekiguchi*,³⁰ in which the Japanese Supreme Court faced the question of whether the municipal government could remunerate Shinto priests for performing a ritual with some religious significance. The dispute started when the City of Tsu held a groundbreaking ceremony called *jichinsai* on the occasion of constructing a city gymnasium. Originally a Shinto rite intended to calm the god of the earth, *jichinsai* is arguably a custom firmly established in most parts of Japan. Many landowners, regardless of their religious affiliation, have this ceremony conducted whenever construction begins on their property, perhaps because carpenters are often reluctant to set to work without a proper *jichinsai*, for fear that it might anger the god of the earth and lead to an accident on site.³¹

A communist member of the city council sued the mayor and sought the return of the priests' honoraria and other expenses for the ritual, arguing that such expenditure out of public funds was unlawful. The Japanese Supreme Court dismissed the suit, on the grounds that *jichinsai* was mostly secular and did not violate the Constitution. The Court emphasized at the outset that a total separation of religion and the State was almost impossible, and that an attempt to realize it would verge on the absurd, calling into question the constitutionality of government subsidies for all private schools including religiously affiliated schools, for example. Accordingly, the Court interpreted Paragraph 3 of Article 20 as prohibiting not all governmental contact with religion, but only that which exceeded reasonable limits.

³⁰ Saikō Saibansho [Sup. Ct.] July 13, 1977 (Gyo-Tsu) no. 69, 31, SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 533, available at <http://www.courts.go.jp/english/judgments/text/1977.7.13-1971.-Gyo-Tsu-.No..69.html> (Japan).

³¹ Carpentering has been a trade with a strong connection with Shintoism in Japan. The Ise Grand Shrine, the apex of all the shrines, for example, owns two adjoining sites of identical size and rebuilds its buildings every twenty years; serving on this project is generally considered to be a high honor for a carpenter. See *Shikinen Sengu Ceremony in Ise Jingu*, JINGŪ, <http://www.isejingu.or.jp/english/sikinen/sikinen.htm> (last visited Oct. 30, 2011). At present, the buildings to be used beginning in 2013 are being built. See *id.* The current construction work started in 2006, following the Emperor's permission in 2004 and a variety of rituals in 2005. See *id.* The Ise Grand Shrine is located in Mie Prefecture, the same prefecture that the City of Tsu belongs to. See *id.*

The majority, consisting of ten Justices out of fifteen, went on to formulate a test to determine whether the contact was within reasonable limits. Under *Kakunaga*, governmental conduct falls under Paragraph 3 of Article 20 only when it has some religious meaning as its purpose and its effect is to "promote, subsidize, or, conversely, to interfere with, or oppose religion."³² The Court concluded that the groundbreaking ceremony was not a religious activity prohibited by Paragraph 3 of Article 20, because its purpose was to "ensure a stable foundation and safe construction"³³ and it could not possibly have the effect of "promoting or encouraging *Shinto* or of oppressing or interfering with other religions."³⁴ The Justices explained that it was unlikely that a secularized ritual such as *jichinsai* would "raise the religious consciousness of those attending or of people in general or lead in any way to the encouragement or promotion of *Shinto*."³⁵

Kakunaga was decided in 1977.³⁶ It has been pointed out that there are echoes of *Lemon v. Kurtzman*, a 1971 decision, in its purpose and effect test.³⁷ Despite the similarity in appearance, however, the *Kakunaga* test is much harder to meet, as there is no entanglement prong and a litigant must demonstrate that the governmental conduct in question has a religious purpose and an effect of promoting or opposing religion in order to prevail. The government enjoys the benefit of the presumption of constitutionality under *Kakunaga*.

³² CURTIS J. MILHAUPT ET AL., *THE JAPANESE LEGAL SYSTEM: CASES, CODES, AND COMMENTARY* 228 (Frank K. Upham trans., 2006).

³³ *Id.* at 230.

³⁴ *Id.*

³⁵ *Id.* Note that, under the majority's view, how the general public perceives the governmental conduct in question weighs heavily in the determination of its constitutionality. *Kakunaga* is thus said to have "allowed state support of religious institutions that were specifically targeted by the postwar Constitution" in effect, for "the religious institutions most likely to get state support are Shinto institutions because of the ease with which Shinto ceremonies can be considered cultural events as opposed to religious events." Keiko Yamagishi, *Freedom of Religion, Religious Political Participation, and Separation of Religion and State: Legal Considerations from Japan*, 2008 BYU L. REV. 919, 932-33.

³⁶ Saikō Saibansho [Sup. Ct.] July 13, 1977 (Gyo-Tsu) no. 69, 31, SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 533, available at <http://www.courts.go.jp/english/judgments/text/1977.7.13-1971.-Gyo-Tsu-.No.69.html> (Japan).

³⁷ For an analysis of the "Japanization" of the purpose and effect test, see Hidenori Tomatsu, *The Reception in Japan of the American Law and Its Transformation in the Fifty Years Since the End of World War II: Constitutional Law*, 26 LAW IN JAPAN 14, 17-18 (2000).

Applying this standard, the Japanese Supreme Court subsequently rejected most of the petitions asking it to declare governmental action inconsistent with Paragraph 3 of Article 20. In *Japan v. Nakaya*,³⁸ a Christian wife of a deceased member of the Ground Self-Defense Force ("SDF") sought damages for his enshrinement in a Shinto shrine without her consent. The Court succinctly rejected her claim, stating that the government's secretarial support for the ex-servicemen's association in its application for the enshrinement of the plaintiff's husband was for the purpose of "rais[ing] the social status and morale of SDF members"³⁹ and "would not be considered by the general public as having the effect of the State drawing attention to a particular religion, or sponsoring, promoting or encouraging a specific religion or suppressing or interfering with a religion."⁴⁰ Likewise, a city's reconstruction of a monument to honor the memory of those who were killed in the war was found to be secular in purpose and neutral in its effect;⁴¹ so was another city's granting permission for a group of residents' erection of a stone statue of a Buddhist saint on a parcel of land owned by the city without paying any rental or other consideration.⁴²

³⁸ Saikō Saibansho [Sup. Ct.] June 1, 1988, 42 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 277 (Japan).

³⁹ MILHAUPT ET AL., *supra* note 32, at 234.

⁴⁰ *Id.* Justice Masami Ito, who was a comparative law professor at the University of Tokyo before joining the bench and was a prolific writer in the area of comparative constitutional law, wrote a passionate dissent, pointing out that the Court must look into the matter from the viewpoint of a minority member when deciding a constitutional case, and that religious minorities in Japan are often hurt because the society is indifferent to religion in general. He was the lone dissenter, however; the remaining fourteen Justices were all of the opinion that the suit should be dismissed.

⁴¹ See Saikō Saibansho [Sup. Ct.] Feb. 16, 1993, 1987 (Gyo-Tsu) no. 148, 47 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1687, available at <http://www.courts.go.jp/english/judgments/text/1993.2.16-1987-Gyo-Tsu-No.148.html> (Japan).

⁴² See 1441 HANREI JIHŌ 57 (Sup. Ct., Nov. 16, 1992), available at http://www.courts.go.jp/hanrei/pdf/js_20100319131444073196.pdf (Japan). This case does not appear to be good law any longer in view of *Kikuya v. Taniuchi*, discussed in Part II of this article. See *infra* Part II.

The only exception to this trend came in 1997. In *Anzai v. Shiraishi*,⁴³ the Japanese Supreme Court held that it was a violation of Paragraph 3 of Article 20 for a prefectural governor to use taxpayers' money for offerings to Shinto shrines. The majority, composed of ten Justices, applied the *Kakunaga* test and found the donation unconstitutional; three Justices concurred in the result, and the remaining two dissented.

Concurring opinions in *Anzai* are illuminating. Justice Itsuo Sonobe⁴⁴—who was an administrative law professor before coming to the Court—suggested that he would apply Article 89, instead of Paragraph 3 of Article 20, and find the offerings automatically invalid; he questioned the propriety of some of the earlier decisions using the *Kakunaga* test inadvertently in the context of Article 89. The other two Justices maintained that *Kakunaga* had been wrong from the beginning in that it allowed government involvement in religion unless proven to be excessive. Indeed, the correct interpretation of Paragraph 3 of Article 20 should be that such involvement is prohibited across the board unless justified by exceptional circumstances. Although a decision invalidating governmental action under a deferential standard of review—particularly when accompanied with forceful concurring opinions—may often be a signal that the Court is willing to adopt a stricter test in the future, the exact scope of *Anzai* was not clear, partly because of its timing: nine Justices out of thirteen who considered the governor's action unconstitutional were those appointed by either the short-lived 1993 coalition government or the following Socialist-led coalition

⁴³ Saikō Saibansho [Sup. Ct.] Feb. 16, 1993, 1987 (Gyo-Tsu) no. 148, 47 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1687, 51 MINSHU 1673 (Sup. Ct., Apr. 2, 1997), available at <http://www.courts.go.jp/english/judgments/text/1997.04.02-1992-Gyo-Tsu-No.156.html> (Japan). The plaintiffs in this case were a group of residents of Ehime Prefecture, whose governor was Haruki Shiraishi, the defendant. *See id.* The organizational head of the plaintiffs was Kenji Anzai, a Buddhist monk. *See id.*

⁴⁴ Justice Sonobe was appointed to fill the vacancy on the Court created by the retirement of Justice Ito in 1989.

government.⁴⁵ Prior to *Anzai*, the vast majority of Justices had been appointed by the dominant Liberal Democratic Party (“LDP”), the party with the greatest affinity for Shintoism.

II. *KIKUYA V. TANIUCHI*: A TURNING POINT

Kikuya v. Taniuchi,⁴⁶ decided January 2010, may be an extension of the suggestions of the concurring Justices in *Anzai*. The essential facts are undisputed. The City of Sunagawa, located in Hokkaido, the northernmost major island of Japan, has a community center on its land. Being otherwise perfectly ordinary, it has a few peculiar features: in front of the one-story building is a *torii*, a double T-shaped stone structure representing a gateway to a Shinto shrine, approximately fifteen feet in width and twelve feet in height. It is a fixture generally believed to demarcate the sacred realm from the secular. There is a plaque attached to the *torii*, which reads “Sunagawa Sorachibuto Shrine.” The community center behind the *torii* gate has two separate entrances, one that is for everyday use and the other for Shinto worshippers who come to pray on New Year’s Day and during the Spring and Autumn Festivals, when Shinto priests are dispatched from a nearby shrine. Local Shinto believers regularly take care of the maintenance and cleaning of the part of the building used as a shrine, but they have never made any payment to the city for the use of its property.

A Christian resident sued the mayor in court, asking for a declaratory judgment that it was illegal for the mayor not to request the neighborhood association in charge of the management of the community center to remove the *torii* and all other facilities and equipment related to Shintoism. The District Court applied the *Kakunaga* test, found that granting permission to use the premises to a religious group amounted to a religious activity proscribed under Paragraph 3 of Article 20, and

⁴⁵ The Liberal Democratic Party, which ran the Japanese government for most of the period between 1955 and 2009, temporarily lost power to the non-LDP coalition of eight parties in 1993. Less than eleven months later, it made a comeback by driving a wedge into the coalition and allying itself with the Socialists and another smaller political group, the Sakigake, but the newly-formed government was led by Prime Minister Tomiichi Murayama, the leader of the Socialist Party, from 1994 to 1996.

⁴⁶ Saikō Saibansho [Sup. Ct.] Jan. 20, 2010, 64 SAIKŌ SAIBANSHO MINJI HANREISHŌ [MINSHŌ] 1, available at <http://www.courts.go.jp/hanrei/pdf/20100120164304.pdf> (Japan).

concluded that the mayor must demand of the neighborhood association that the city property be kept free of religious objects or symbols. The High Court affirmed. The Japanese Supreme Court affirmed in part and reversed in part, but it made it clear that the city's inaction was constitutionally impermissible. The only reason it reversed the judgment below was because it opined that the problem might well be solved by transferring the title of the property to the neighborhood association—an aggregate of private citizens—or charging them a reasonable rent.⁴⁷

Interestingly, the Supreme Court did not discuss Paragraph 3 of Article 20 at all. Instead, it took a new approach to the issue and applied Article 89. Under the majority's view, when the State or a municipality lets a religious institution make use of public property free of charge, its constitutionality under Article 89 is determined by looking to all the circumstances—including the nature of the religious institution in question, how its use of public property started, what kind of benefits are provided, and how the general public views the situation. The Court made only a passing reference to its precedent: It simply stated that its interpretation of Article 89 is consistent with both *Kakunaga* and *Anzai*.

After examining the totality of the circumstances, the majority concluded that the city's inaction was unconstitutional under Article 89. It found that the religious institution in question was nothing but a Shinto shrine, and that the shrine was continuously receiving benefits not enjoyed by others for an extended period of time. Although the way the use of public property had started was not completely out of reason, for a substantial portion of the land had been donated to the city by one of its residents—supposedly a Shinto believer—with the understanding that the shrine could continue to operate there, the general public would inevitably view the state of affairs as the city giving special benefits and support to Shintoism.⁴⁸ The Court therefore held that the entanglement between the city and the shrine or Shintoism exceeded reasonable limits and was in

⁴⁷ See *id.*

⁴⁸ The resident invited the shrine, which needed space to rebuild its building, to move onto his land rent-free around 1948, but thereafter offered the premises gratis to the then Town of Sunagawa to avoid the continued burden of property tax. See *id.* The town council voted to accept his proposal and acquired the title of the land in 1953. See *id.*

contravention of Article 89. Additionally, it suggested that the status quo might also be seen as a violation of Paragraph 1 of Article 20, which forbids privileges for religious organizations. The case was remanded to the Sapporo High Court for reconsideration of remedies, because the eight Justice majority did not agree with the lower court's ruling that the mayor must urge the neighborhood association to remove all things religious from the city property. The city could, for example, ameliorate the constitutional problem by collecting a rent commensurate with the market rate.

Four Justices wrote a joint opinion concurring in the result only, and maintaining that the Sapporo High Court's findings of facts—on which the majority based its judgment—were too insufficient and one-sided to support the Court's conclusion as to the constitutionality of the shrine's presence on municipal land, thereby calling for a remand to examine the evidence more thoroughly and consider "all the circumstances" in the true sense of the word.⁴⁹ Two Justices dissented, but one of them was of the opinion that he would uphold the judgment below in its entirety, without remanding the case. Only one Justice said that he would rather declare it in fact constitutional for the city to let Shinto believers continue to use its property free of charge.⁵⁰

Bypassing *Kakunaga* by relying on Article 89, *Kikuya* effectively changed the rules of the game for lawsuits aimed at eliminating excessive government involvement with religion. The Japanese Supreme Court has established a new framework for reviewing the constitutionality of governmental action in this area, under which it can more freely fine-tune the thresholds according to individual factual backgrounds. The Justices' admonition to the mayor regarding his loose control and poor management of public resources has sent a shock wave from Hokkaido to Okinawa, as it is estimated that there are thousands of shrines that "continue to enjoy privileged, and so probably

⁴⁹ Japanese intermediate appellate courts are empowered to make additional findings of facts as they see fit in civil and administrative cases. See MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] 1996, art. 297 (Japan); Gyosei Jiken Sosho Ho [Administrative Case Litigation Law], Law No. 139 of 1962, art. 7. ("Any matters concerning administrative case litigation which are not provided for in this Act shall be governed by the provisions on civil actions.").

⁵⁰ Only fourteen Justices participated in this case, because there was an unfilled vacancy caused by the sudden death of one Justice.

unconstitutional, access to municipal land”⁵¹ in the country. It is also notable that many of the Court’s earlier decisions concerning Paragraph 3 of Article 20 appear to be susceptible to overruling if they are to be reconsidered in light of *Kikuya*, for many of them involve the payment of money, the transfer of property, or the provision of services or other benefits. The discovery of Article 89’s hidden potential may have a significant impact upon the actual day-to-day practice of local governments across Japan, and ultimately upon how Japan is perceived by outsiders living within its borders, as well as by the rest of the world—especially by neighboring Asian nations where Shintoism is still regarded as a symbol of militarism.

One vexing question remains: What about the national government’s entanglement with religion? Here lies a fundamental contradiction. More than sixty years after the adoption of the United-States-inspired constitution, Japanese litigants are suffering from the remnants of the past, in the form of an inflexible understanding of administrative law and procedure imported from pre-war Germany, followed faithfully by fossilized judges and doctrinaires. The theory, still prevalent in practice, goes like this: as for the unlawful use of public funds by a prefecture or a municipality, any resident thereof can challenge it in court, since there is a provision in the Local Autonomy Law explicitly authorizing a citizen to bring an action.⁵² In contrast, nowhere in the Japanese Gazette is there a statute recognizing the rights of taxpayers to sue the national government for such a wrong, unless associated with some other, more individualized harm for which redress is available.

As a result, Japanese taxpayers today find themselves in an anomalous position, where, with respect to exactly the same kind of governmental action, they must demonstrate that their own rights are infringed upon if they are to sue the State, whereas no such proof is necessary if the defendant is a local government. The best example of the preposterousness of this approach can be seen in a 1995 decision of the Osaka High Court, which rejected a claim for a declaratory judgment that the expenditure of over 2.5 billion yen out of public coffers for *daijosai*, the first major Shinto ceremony conducted by the Emperor after his enthronement, was

⁵¹ John Breen, “Conventional Wisdom” and the Politics of Shinto in Postwar Japan, 4 POL. & RELIGION 68, 70 (2010).

⁵² See Chiho Jichi Ho [Local Autonomy Law], Law No. 67 of 1947, art. 242–2.

unconstitutional.⁵³ In an ironical dictum, the three judges unanimously pointed out that “it is evident that *daijosai* has a character as a Shinto ritual,”⁵⁴ and that “there remains some doubt”⁵⁵ as to whether the disbursement would be constitutional if it were to be examined under *Kakunaga*. That did not affect the outcome of the case, however, for the governmental action in question did not impose material obligations or burdens on the plaintiffs, according to the Osaka High Court.⁵⁶

Yet, it is also true that such incongruous decisions have brought to light the inadequacy of mechanical and formalistic jurisprudence. Citing *Kurokawa v. Chiba Prefecture Election Commission*,⁵⁷ in which the Supreme Court held despite the lack of a statutory basis enabling the plaintiff to file a suit that vote dilution through malapportionment violated the Equality Clause,⁵⁸ Hidenori Tomatsu—the foremost authority on Japanese constitutional law litigation—emphasizes that lawsuits to enforce the separation of church and state should be entertained against the national government, as well as the local ones, in order to promote constitutional values.⁵⁹ He also proposes that a new statute should be enacted to specify the procedures for seeking damages in tort or contract against the State,⁶⁰ considering that such an action is often the only practicable measure a plaintiff can take when trying to implement a constitutional norm against the national government’s

⁵³ See 46 GYOSHU 250 (Osaka High Ct., Mar. 9, 1995), available at <http://www.courts.go.jp/hanrei/pdf/138ECD21CF88967049256D41000A7924.pdf>.

⁵⁴ *Id.* (author’s translation).

⁵⁵ *Id.* (author’s translation).

⁵⁶ The plaintiffs in this case presented a variety of novel claims, probably the most central of which was that they, either as taxpayers or as members of the electorate, had been indirectly compelled to attend the ritual, whose expenses had been paid from public funds and whose attendees had included the Speaker of the House of Representatives and the President of the House of Councillors. See *id.*

⁵⁷ Saikō Saibansho [Sup. Ct.] Apr. 14, 1976, 30 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 223, available at http://www.courts.go.jp/hanrei/pdf/js_20100319121425398065.pdf (Japan).

⁵⁸ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 14, para. 1 (Japan) (GOV’T PRINTING BUREAU trans.), available at <http://www.ndl.go.jp/constitution/e/etc/c01.html>. Following in the footsteps of its American counterpart *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court of Japan overruled its earlier precedent, under which the matter had been left to the discretion and prudence of the legislature, and struck down the relevant provisions of the Public Offices Election Law.

⁵⁹ See HIDENORI TOMATSU, KENPŌ SOSHŌ 143 (2008).

⁶⁰ See *id.* at 150.

unlawfulness. The plaintiffs in the *daijosai* case, for example, claimed compensation for emotional pain and suffering caused by the government-sponsored Shinto ceremony, which they did not approve of, but the Osaka High Court was hard pressed to find a statutory ground for awarding damages to them.

If the Japanese Supreme Court is willing to stretch its judicial creativity a little further, it may be possible to elaborate upon *Kikuya* and make a fresh observation on the issue of politicians' visits to the Yasukuni Shrine, a shrine dedicated to those who died in war including executed Class A war criminals, which have been a source of tension between Japan and its neighbors since at least the 1980s.⁶¹ Because of the lack of alternatives, litigants in the past challenged the constitutionality of prime ministerial visits to the Yasukuni Shrine via the National Compensation Law⁶² or the Civil Code,⁶³ seeking damages for emotional distress caused by the infringement upon their religious freedom,⁶⁴ the right to privacy,⁶⁵ or the right to live in peace.⁶⁶ No court has ever recognized an invasion of such rights in this context. This has made the question of whether the Prime Minister's visit to the Yasukuni Shrine is compatible with the Constitution totally irrelevant and not worth answering, although some lower courts have gone ahead and found it unconstitutional in dicta.⁶⁷ Every single claim for damages has been denied, as no cognizable interest exists in the first place in the eyes of the law.⁶⁸

⁶¹ Yasukuni has been the "single most important issue in post war state-religion relations" in Japan. See Breen, *supra* note 51, at 71. The Yasukuni Shrine occupies a special place in the hierarchy of Shinto shrines in that it is above all an imperial shrine. "Its war dead died for imperial Japan; its rituals are graced by the presence of imperial emissaries. Those rituals celebrate the imperial virtues the dead exhibited in their dying: patriotism and loyalty and self-sacrifice." *Id.* at 79.

⁶² Kokka Baisho Ho [National Compensation Law], Law No. 125 of 1947, art. 1, para. 1.

⁶³ MINPŌ [MINPŌ] [CIV. C.] art. 709 (Japan).

⁶⁴ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 43, para. 1 (Japan) (GOV'T PRINTING BUREAU trans.), available at <http://www.ndl.go.jp/constitution/e/etc/c01.html>.

⁶⁵ *Id.* art. 13.

⁶⁶ *Id.* pmbl.

⁶⁷ *E.g.*, 52 SHOGETSU 2979 (Osaka High Ct. Sept. 30, 2005).

⁶⁸ This long-held view, unanimously espoused by those lower courts considering the controversy, has been reinforced by a 2006 decision of the Supreme Court, which has made it clear that there is no right to seek compensation for emotional distress caused by another person's visit to a particular shrine. See 1940 HANREI JIHO 122 (Sup. Ct., June 23, 2006).

It would be extremely unnatural, however, if Article 89 could not be applied to the national government without proof of infringement on individual rights. Now that the obscure provision in the chapter on finance has turned out to be remarkably effective as a restraint upon the local government's sloppy property management, the paradox of the traditional formalistic approach is visible to everyone. A politician capable of attracting domestic and international attention is most probably accompanied by security guards, who are public servants, twenty-four hours a day, seven days a week. He or she typically uses an official vehicle wherever he or she may go. Ex-Prime Minister Koizumi used to justify his visits to the Yasukuni Shrine by highlighting that worshipping the souls of the war dead was not part of his official duty as the Prime Minister,⁶⁹ but the use of public resources for personal religious purposes would be highly questionable if it were to be examined from the angle of Article 89, or in light of the totality of the circumstances. Whatever the purpose of the Prime Minister's visit may be, the general public is likely to consider it as the government giving special support to Shintoism associated with ancestor worship. Seemingly a case about a community center in the distant countryside at first glance, *Kikuya* may be an encrypted message from the judiciary to nostalgic politicians in Tokyo.⁷⁰

CONCLUDING OBSERVATIONS:

THE IMPACT OF GLOBALIZATION FOR JAPANESE LAW

Article 81 of the Constitution of Japan provides that the Japanese Supreme Court is "the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."⁷¹ As a matter of legal structure, it has therefore been possible, and in fact obligatory, for the Japanese judiciary to step in to invalidate law or governmental action infringing upon individual rights and liberties and enforce constitutional norms for the past sixty-plus years. The Court, however, was not active in fulfilling its mission up until recently. Its indecisiveness was noted by outside observers. Lawrence Friedman points out that

⁶⁹ See, e.g., Reiji Yoshida, *Koizumi Visits Yasukuni Shrine*, JAPAN TIMES, Oct. 18, 2005.

⁷⁰ See Breen, *supra* note 51, at 79.

⁷¹ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 81 (Japan) (GOV'T PRINTING BUREAU trans.), available at <http://www.ndl.go.jp/constitution/e/etc/c>

the Supreme Court of Japan has been "rather reluctant to exercise the power"⁷² of judicial review, very much unlike the German constitutional court, which was also created when Americans restructured the government after the Second World War;⁷³ Tom Ginsburg too notices that the Court "appears to follow a path of great restraint."⁷⁴ Ginsburg describes what the Court exercises as "low-equilibrium judicial review."⁷⁵ Since the Court is concerned about its own ability to secure compliance from other bodies, it does not often challenge politically powerful actors, with the result that it is "rarely called upon to adjudicate truly important disputes."⁷⁶

To put things into perspective, even in the United States, the Supreme Court seldom exercised the power of judicial review before the Civil War, although *Marbury* itself was decided in 1803. The first few successful cases involving freedom of speech or freedom of the press came still later, specifically in the 1920s and 1930s;⁷⁷ and as for the Free Exercise Clause and the Establishment Clause of the First Amendment, the Court seems to have started vindicating them in the 1940s.⁷⁸ Even in the homeland of judicial review, it took more than a century before the judiciary embarked on actively enforcing rights and liberties enshrined in the Bill of Rights.

This was perhaps because, first, before the beginning of the twentieth century, judges deciding constitutional claims did not have enough accumulation of case law or constitutional theories to rely on, as there had been few decisions about individual rights and liberties, and second, on the part of the society as well, the idea of bringing a lawsuit to defend one's constitutional rights was not so common among the general public. The model for constitutional decision-making was apparently lacking. Major civil rights organizations such as the National Association

⁷² LAWRENCE M. FRIEDMAN, *THE HORIZONTAL SOCIETY* 68 (1999).

⁷³ *See id.*

⁷⁴ TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 98 (2003).

⁷⁵ *Id.* at 99.

⁷⁶ *Id.* at 74.

⁷⁷ *See, e.g.,* *Near v. Minnesota*, 283 U.S. 697 (1931); *Fiske v. Kansas*, 274 U.S. 380 (1927).

⁷⁸ *See, e.g.,* *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

for the Advancement of Colored People⁷⁹ and the American Civil Liberties Union⁸⁰ started their activities in the first half of the twentieth century. In the case of Japan, the circumstances similar to those of the United States before the era of civil rights still exist today.

It is then little wonder that the Supreme Court of Japan has not utilized its power of judicial review frequently so far. The situation has been quite extreme. The Appendix to this Article below shows the number of its decisions that struck down statutory provisions or governmental actions on constitutional grounds. Even taking into consideration Japan's low litigation rates per capita and the disproportionately small number of lawyers,⁸¹ these figures seem too low. The Court has held statutory provisions unconstitutional only eight times in its entire history.

Yet a closer look reveals that major qualitative changes are taking place. The Supreme Court seems to have gotten more attentive to its mission and "less timid over time."⁸² Most importantly, there has been a shift in the areas the Court focuses its attention on.

Although there are a number of decisions that invalidated governmental actions on constitutional grounds from the 1940s to the 1970s, they are mostly those that arose from idiosyncratic fact patterns. In one case, the court of first instance forfeited the vessel and cargo used for smuggling without providing any notice whatsoever to the owner, who had nothing to do with the

⁷⁹ The NAACP was founded in 1909; the NAACP Legal Defense and Education Fund, the civil and human rights law firm, was established in 1940. See *NAACP v. NAACP Legal Defense & Educ. Fund, Inc.*, 753 F.2d 131, 132, 133 (D.C. Cir. 1985).

⁸⁰ The ACLU, the largest public interest law firm in the United States, according to its website, was founded in 1920. See *ACLU History*, ACLU, <http://www.aclu.org/aclu-history> (last visited Oct. 30, 2011).

⁸¹ See Bruce E. Aronson, *The Brave New World of Lawyers in Japan: Proceedings of a Panel Discussion on the Growth of Corporate Law Firms and the Role of Lawyers in Japan*, 21 COLUM. J. ASIAN L. 45, 47–49 (2007) ("[F]or much of the postwar era the reality of legal practice in Japan seemed consistent with the image of a society which neither depended on nor highly valued lawyers."). As a result of the recent legal reform, the number of lawyers in Japan is expected to exceed 30,000 soon. This number is still less than that of newly qualified attorneys per year in the United States but was enough to cause political turmoil: the Japan Federation of Bar Associations is requesting the government to suspend the ongoing reform. See *Number of Lawyers in Japan To Top 30,000 Soon*, JAPAN TODAY (on file with author).

⁸² See FRIEDMAN, *supra* note 72.

defendant;⁸³ in another case, the criminal trial was discontinued for more than fifteen years for unknown reasons.⁸⁴ Similarly, decisions that invalidated statutory provisions in the 1970s also include one eccentric case, in which a provision in the Criminal Code mandating capital punishment or lifetime imprisonment for patricide, irrespective of individual circumstances, was held to be unconstitutional.⁸⁵ These cases are so outlandish that it is obvious to anyone that there were serious violations of constitutional law. Aside from such exceptions, the Court was evidently unwilling to enforce constitutional norms against the wishes of the government.

Recent examples of judicial intervention contrast nicely with such lethargy in the past. In *Takase v. Japan*,⁸⁶ decided in 2005, the Supreme Court held that Public Offices Election Law precluding Japanese citizens residing abroad from voting in national elections was inconsistent with the constitutional guarantee of voting rights. Applying the strict scrutiny standard for the very first time, the Court made an exacting inquiry into possible justifications for the exclusion and notes that, due to the advancement in communication technology on a global scale, qualified voters residing in all parts of the world can now easily familiarize themselves with the information about legislative candidates via the Internet. Accordingly, it has held that the

⁸³ Saikō Saibansho [Sup. Ct.] Nov. 28, 1962, 16 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 1593.

⁸⁴ Saikō Saibansho [Sup. Ct.] Dec. 20, 1972, 26 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 631.

⁸⁵ Saikō Saibansho [Sup. Ct.] Apr. 4, 1973, 27 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 265. The stipulated punishment was much more severe than that for ordinary homicide, which was imprisonment for not less than three years. The Court held that such a large difference was not rationally related to a legitimate government interest and was thus in violation of the Equality Clause. See NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 14, para. 1 (Japan) (GOV'T PRINTING BUREAU trans.), available at <http://www.ndl.go.jp/constitution/e/etc/c01.html>. The Public Prosecutors Office thereafter stopped using the nullified provision, instead opting to indict all patricide offenders for ordinary homicide. However, due to fierce opposition from conservative quarters, the legislature did not remove the unconstitutional provision from the Criminal Code until 1995, when the coalition government led by Socialists finally deleted it.

⁸⁶ Saikō Saibansho [Sup. Ct.] Sept. 14, 2005, 59 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2087. The law was found to be simultaneously in violation of Article 15, Paragraphs 1 (the right to choose public officials) and 3 (universal adult suffrage), Article 43, Paragraph 1 (the Diet's character as the representative of all the people), and the proviso to Article 44 (prohibition of discrimination as to the qualifications of electors of members of the Diet). See *id.*

need for well-informed decisions, cited by the Ministry of Justice as the reason for exclusion, cannot be a compelling government interest justifying the disenfranchisement of Japanese citizens living abroad. The number of such citizens is currently more than 1.1 million.⁸⁷ By ensuring that their voting rights are protected, the Court has included into the political process a diverse and important group of voters: those who have contacts with people of different nationalities and cultures on a daily basis.⁸⁸

Even more significant is *Anonymous v. Japan*,⁸⁹ rendered in 2008. In this case, the Supreme Court declared a provision in the Nationality Act⁹⁰ unconstitutional under the Equality Clause.⁹¹ The Japanese Nationality Act is an interesting piece of legislation in that, although technically part of public law, follows the *jus sanguinis* principle characteristic of continental legal systems, rather than the Anglo-American *jus soli* principle, as to attribution of nationality at birth.⁹² There was a problem, however, because of its narrow wording: “although an illegitimate child acquire[d] Japanese nationality by birth *ipso facto* when its mother [was] a Japanese national, it [did] not do so when only its father [was] a Japanese national unless the father recognize[d] the child before its birth.”⁹³ Explaining that nationality must be determined at the time of birth, the Ministry of Justice denied Japanese nationality to children born out of wedlock to non-Japanese mothers and Japanese fathers but

⁸⁷ See MINISTRY OF FOREIGN AFFAIRS, ANNUAL REPORT OF STATISTICS ON JAPANESE NATIONALS OVERSEAS (2009), available at <http://www.mofa.go.jp/mofaj/toko/tokei/hojin/10/pdfs/1.pdf>. The latest available figure is 1,131,807, calculated in October 2009. The number of Japanese people in Iraq is not publicly disclosed for security reasons and therefore not included here. *Id.*

⁸⁸ The legislature amended the Public Offices Election Law the following year to make sure that voters living outside of Japan could cast their ballots, either by mail or at diplomatic and consular offices abroad. See Law No. 62 of 2006.

⁸⁹ Saikō Saibansho [Sup. Ct.] June. 4, 2008, 2006 (Gyo-Tsu) 135, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 6 (Japan), available at <http://www.courts.go.jp/english/judgments/text/2008.06.04-2006.-Gyo-Tsu-.No..135-111255.html>.

⁹⁰ [Nationality Act], Law No. 147 of 1950.

⁹¹ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 14, para. 1 (Japan) (GOV'T PRINTING BUREAU trans.), available at <http://www.ndl.go.jp/constitution/e/etc/c01.html>.

⁹² See Hosokawa Kiyoshi, *Japanese Nationality in International Perspective*, in NATIONALITY AND INTERNATIONAL LAW IN ASIAN PERSPECTIVE 177, 191 (Ko Swan Sik ed., 1990).

⁹³ *Id.* at 192.

acknowledged by the fathers after they were born. The only way for them to acquire nationality was through legitimation by subsequent marriage of the parents—which was not always available and in any event beyond the control of the children themselves. Many of these children's mothers were Philippine and other Asian women, as was the case with the plaintiffs.

In holding that such discriminatory treatment is no longer allowed, the Japanese Supreme Court placed much emphasis on the rapid progress of globalization, specifically referring to the increase in the number of international marriages and cohabitations in Japan. The majority pointed out that no fault could be attributed to the plaintiffs. Accordingly, it struck down the statutory scheme as not rationally related to the asserted government interest of limiting nationality to those with a strong connection with Japan. Following *Anonymous*, the legislature quickly amended the relevant provisions and the new Nationality Act⁹⁴ came into force in 2009. An illegitimate child like the plaintiffs in *Anonymous* can now acquire Japanese nationality *ipso jure* by simply filing with the Minister of Justice, stating that his or her father is a Japanese national. The Minister of Justice may make inquiries but has no discretion to reject a valid application.

Kikuya, as well as *Anzai* in hindsight, is a momentous decision that needs to be understood in the context of these latest developments in Japanese constitutional law. As discussed in Part II, the Supreme Court analyzed the case in a way quite different from the previous line of cases and applied Article 89, instead of Paragraph 3 of Article 20. In doing so, the Court subtly heightened the constitutional threshold the government must satisfy. Under *Kikuya*, the purpose and effect of governmental action are no longer decisive, particularly when activities conducted on public property are patently religious in nature. This landmark Supreme Court decision, which makes it easier for a citizen to challenge governmental action, is a reminder to public officials across Japan that they are required to live up to the constitutional commitment to separation of church and state—a commitment that is becoming increasingly important as the society matures and consideration for minorities and neighboring countries emerges as a new

⁹⁴ [Nationality Act], Law No. 88 of 2008.

challenge. The Court's special attention to the separation of church and state seems deliberate and especially appropriate in light of the fact that conservative Japanese politicians' homage to the Yasukuni Shrine has frequently drawn harsh criticism from surrounding nations in recent years.

With a series of innovative, outward-looking decisions embodying the spirit of the Preamble to the Constitution of Japan, the Japanese Supreme Court has made clear its intention to intervene when it is necessary to enforce constitutional norms against the government. The issues dealt with in cases decided after around 1990 are more substantive than those identified in earlier cases in terms of their constitutional significance: voting rights, prohibition on discrimination based on immutable characteristics, and the separation of church and state, which is meant to solidify the protection of religious liberty, according to *Kikuya*.

Judicial activism in enforcing individual rights and liberties is referred to as a "worldwide movement"⁹⁵ these days. Friedman points out that "the trend toward stronger and more active courts"⁹⁶ is found on all continents including Asia. Japan is starting to join this international trend, although, admittedly, the number of powerful decisions like *Kikuya* is still low. It is heartening that the Japanese Supreme Court seems to be concentrating its efforts on areas that are particularly important from the perspective of redeeming the debt of imperialism and strengthening Japan's ties with its neighbors, such as the separation of church and state. The full picture of *Kikuya's* effects remains to be seen; one of the matters that should be looked into in the future will be judicial philosophy and voting patterns of seven new Justices⁹⁷ appointed by the Hatoyama and

⁹⁵ FRIEDMAN, *supra* note 72.

⁹⁶ *Id.*

⁹⁷ None of these Justices took office in time for participation in the consideration of the *Kikuya* case.

Kan cabinets consisting mostly of Democrats,⁹⁸ whose promise in the election of 2009 was to break with the old-style politics of the pro-Shinto LDP.⁹⁹

⁹⁸ Yukio Hatoyama, the former leader of the Democratic Party of Japan, was Prime Minister of Japan from September 2009 to June 2010. *Profile: Yukio Hatoyama*, BBC NEWS, <http://news.bbc.co.uk/2/hi/asia-pacific/8168838.stm> (last updated June 2, 2010, 7:28). He was succeeded by Naoto Kan in both capacities. *Naoto Kan*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/k/naoto_kan/index.html (last updated Aug. 29, 2011). By coincidence five Supreme Court Justices retired because of their age and two Justices passed away in office between December 2009 and November 2010, making 2010 a year with an unusually high number of appointments of Justices. *Cf.* Saibansho Ho [Judiciary Act], Law No. 59 of 1947, art. 50 (Justices hold tenure until the age of mandatory retirement, age 70).

⁹⁹ "One is struck by the intimate connections between the LDP and the SAS SAS debating club members are all LDP." Breen, *supra* note 51, at 79. SAS stands for the "Shinto Association of Spiritual Leadership," the political wing of the Shinto establishment founded in 1969. *See id.* at 74.

APPENDIX:
NUMBER OF JAPANESE SUPREME COURT DECISIONS THAT
INVALIDATED STATUTORY PROVISIONS OR GOVERNMENTAL
ACTIONS

	1940s	1950s	1960s	1970s	1980s	1990s	2000s	2010
Number of Supreme Court Decisions That Invalidated Statutory Provisions	0	0	0	3 (Equality 2; Economic Liberty 1)	2 (Equality 1; Economic Liberty 1)	0	3 (Right to Sue for Redress 1; Voting Right 1; Equality 1)	0
Number of Supreme Court Decisions That Invalidated Governmental Actions	1*	3*	4*	2*	0	1 (Separation of Church and State)	0	1 (Separation of Church and State)
Total	1	3	4	5	2	1	3	1

* Most of the cases in these cells were about gross infringements of constitutional rights of suspects, defendants, or third parties in criminal proceedings, except that two of them involved a technical issue of whether GHQ directives and regulations remained in force after the San Francisco Peace Treaty had taken effect, and one was about the permissibility of a judge-mandated settlement in an eviction case.

